1. Introduction

The essential facility doctrine (hereinafter called: “EFD”) has a long and proud history. Rigorous scrutiny of this concept should be preceded by crucial question to which extend the doctrine finds its practical application. Although the dogma, its uncertainty and an imprecise scope is widely commented by scholars, both the US and EU courts have developed their understanding which within EU was openly introduced by the Commission yet in the early 90’s and has been thereafter applied for over thirty years. The EFD, also called „unilateral refusal to deal“ or as the „bottleneck doctrine“, became widely recognized but a non-standardized exception from exclusive usage of facility which was previously acquired or built with private resources, but in order to ensure fulfillment of competition law objectives, should be somehow shared with competitors. The paradigm reflects, by extension, a judicial concept walking a tightrope between legally protected right of ownership and sensibly imposed duty to share entry and benefits gained from such key facility.

2. Main assumptions

The doctrine shall be seen as an „extra weight“ in a market dominated by an undertaking possessing significant power. In simple terms, the doctrine imposes on the owners of essential facility a duty to deal with competitors. Thus, the concept illustrates modern economic-oriented antitrust policy, where the pre-eminence of competitiveness is understood as providing access to something „essential“ for competition in a particular market. Objective necessity criterion in the essential facility doctrine is a necessary usage of a product or infrastructure in order to enter into a market or to initiate an activity, as no other alternative exists or is granted. Therefore, in cases where an input, facility or infrastructure owned by an undertaking in dominant position is crucial to ensure effective competition on the downstream market and at the same time it is not legally, technically or economically possible to find an alternative for this input, facility or infrastructure, an obligation to supply such essentials to competitors in the downstream market is imposed on undertakings in a dominant position through EFD. It follows that the main purpose is to impose on the competitor a duty to negotiate and/or give access to the facility, against a reasonable fee. Without access to such key infrastructure such undertaking is not able to pursue its own activity in a profitable manner and as a result will be shortly driven out of the market. The legal framework upon which the doctrine hinges is protection of just, open and equitable competition.

2.1. Evolution and application of the EFD

The courts and competition authorities both at the EU and the member state level, tend to reason in a specific way, when face with cases where the use of some essential infrastructure of facility is at stake. However, the adoption of specific pattern evolved through case law which at the present time seems to argue in favour of the existence of the doctrine. The existence of the concept was repeatedly confirmed, although mostly stayed unnamed, through notable judgments such as Terminal Railroad Association, Microsoft, Oscar Bronner or IMS Health. Several practical problems could be identified in reconciling objectives of the doctrine. The EFD clearly gives precedence to the maintenance of competition over the contractual freedom of undertakings controlling not always unique, but unarguably important facility. Nevertheless, the concept has far-reaching impact on constitutional right to proprietorship and serves as a long-standing limitation on the general contract law rule that an undertaking has no obligation to deal with competitors. Such concept is visible especially at the heart of US antitrust law as essential facility doctrine renders a strategic, unilateral refusal to deal subject to potential liability of monopolisation of Section 2 of the U.S. Sherman Act and respectively abusive behaviour under art. 102 TFEU.

That notwithstanding, the rationale for EFD reaches far from freedom of contract or allegation of infringement of property rights. The idea has significant output on incentive to innovate and causes calculable problems for free riders. Taking into account that EFD is applied in various sectors, ranging from railroads, fruit and vegetables wholesaling, through telecommunications, land and sea transportation, aviation industry, professional sports, ending with audiovisual and media sectors, the effects of application of the doctrine become extremely vast. It should be however stressed that if the facility is truly essential, the dominant in a particular market will be immune on certain stages of competition (or even will not be allowed to take part therein at all). This is why, although progressing liberalisation of the markets, an amount of cases related to access to essential facilities does not decrease. Hence, in a state-dominant sectors, the competition authorities constantly emphasize a necessity to force undertakings not only to simple declaration of access, but also to promote continuing supervision of access-price, priority and other standard sale provisions of its powerful competitors.

2.2. Practical aspects
How does the concept look in practice? The origin state of the essential facility doctrine and the rest of the world, especially EU members have taken considerably different approaches to EFD among recent years. Within European legal system, the significance of the doctrine was articulated in Oscar Bronner case, where AG Jacobs pointed out the main idea behind the dogma: "a dominant undertaking must not merely refrain from anti-competitive action but must actively promote competition by allowing potential competitors access to the facilities, which it has developed." [underline from the author]. Is it truly reasonable to expect from the undertaking, making profit-orientated decisions in his own interest, to care about promoting competition on a relevant market? Further development of the EFD arose only more doubts regarding the legitimacy of the EFC, especially as regards its interference with other branches of law. By a way of example, the landmark Microsoft case fueled the debate as to what extent it is desirable that competition law destabilizes the exclusive rights of intellectual. The triggered problem was further explored in the IMS case, which constituted suitable opportunity for the Court of Justice to establish a clear principle on essential facilities in the context of intellectual property rights. Although the doctrine touches vary law branches and disciplines, it is still unclear what a potential undertaking, acting in order to maximize its profit on the market, should expect and whether or not the other undertakings claiming an access to subjectively essential facility could rely on the concept. In practice, the broad EFD definition appears to be capacious and capable of bringing almost any asset within its ambit, which from commercial perspective does not promote neither legal certainty for the undertakings possessing certain assets nor solid ground for the weaker competitors wishing to continue its business activity on a particular market.

2. H. Ercument Erdem, Abuse of dominant position through refusal to supply, p. 2.